Credit Guarantee Corp Malaysia Bhd v Clean Image Sdn Bhd & Ors

HIGH COURT (MUAR) — CIVIL SUIT NO JB-22M-2–03 of 2021
AWANG ARMADAJAYA JC
20 MARCH 2022

Civil Procedure — Summary judgment — Whether triable issues existed — Whether defendants' opposition to summary judgment application merely made bald assertions without condescending to particulars — Whether no triable issues were raised requiring the suit to go for full trial

The plaintiff had provided the first defendant with a RM3m Islamic financing facility under the Bumiputera Islamic Murabahah Commodity Project Fund to finance a construction project. The second and third defendants jointly and severally guaranteed the first defendant's repayment of the facility. Following the first defendant's default, the plaintiff issued a letter of demand for repayment of RM1,002,683.20 ('the said sum') due under the facility as at 31 December 2020 but the demand was not heeded, causing the plaintiff to file the instant suit for recovery of the said sum together with late payment charges at the rate of 1%pa from 1 January 2021 until date of full payment. The plaintiff applied for summary judgment against the defendants under O 14 of the Rules of Court 2012. In their affidavit resisting the application, the defendants: (a) disputed the said sum as the plaintiff had failed to produce documents relating to payment by the Public Works Department to the plaintiff; and (b) contended that the financing agreement between the parties was null and void for not being Syariah compliant.

Held, allowing the summary judgment application:

(1) A perusal of the cause papers showed that there was a statement of account for the escrow account that stated the payment that had been made by the Public Works Department. This document was not contradicted by the defendants and was therefore deemed to be admitted by them (see paras 24–25).

(2) The court was satisfied, inter alia, that the sum disbursed to the first defendant by the plaintiff (including the profits calculated) was RM1,002,683.20 as at 31 December 2020. The defendants' affidavit did not give particulars of the alleged inaccuracies in the calculation of the sum claimed (see paras 26–27).

(3) The defendants failed to give any details or exhibit any documents to support their contention that the facility agreement between the parties

was null and void for being Syariah non-compliant. A mere bald assertion to that effect was gravely insufficient for the purpose of opposing the summary judgment application. The defendants had failed to raise any triable issue to warrant the matter going for full trial (see paras 28, 30, 32 & 58).

[Bahasa Malaysia summary

Plaintif telah memberikan kemudahan pembiayaan Islam sebanyak RM3 juta di bawah Dana Projek Komoditi Murabahah Islam Bumiputera kepada defendan pertama untuk membiayai projek pembinaan. Defendan kedua dan ketiga secara bersama dan berasingan telah menjamin pembayaran balik defendan pertama kemudahan tersebut. Defendan pertama telah gagal membayar balik kemudahan tersebut dan plaintif mengeluarkan surat tuntutan pembayaran balik sebanyak RM1,002,683.20 ('jumlah tersebut') yang perlu dibayar di bawah kemudahan tersebut pada 31 Disember 2020 namun tuntutan tersebut tidak diendahkan, menyebabkan plaintif memfailkan saman ini untuk mendapatkan semula jumlah tersebut dengan caj pembayaran lewat pada kadar 1% setahun dari 1 Januari 2021 sehingga tarikh pembayaran penuh. Plaintif memohon penghakiman terus terhadap defendan di bawah A 14 Kaedah-Kaedah Mahkamah 2012. Dalam afidavit yang membantah permohonan tersebut, defendan: (a) mempertikaikan jumlah tersebut kerana plaintif telah gagal mengemukakan dokumen yang berkaitan dengan pembayaran oleh Jabatan Kerja Raya kepada plaintif; dan (b) berpendapat bahawa perjanjian pembiayaan antara pihak-pihak adalah terbatal dan tidak sah kerana tidak mematuhi Syariah.

Diputuskan, membenarkan permohonan penghakiman terus:

(1) Penelitian terhadap kertas-kertas kausa menunjukkan bahawa terdapat penyata akaun akaun *escrow* yang menunjukkan bayaran yang telah dibuat oleh Jabatan Kerja Raya. Dokumen ini tidak disangkal oleh defendan-defendan dan oleh itu dianggap diterima oleh mereka (lihat perenggan 24–25).

(2) Mahkamah berpuas hati, antara lain, bahawa jumlah yang dikeluarkan kepada defendan pertama oleh plaintif (termasuk keuntungan yang dikira) adalah RM1,002,683.20 pada 31 Disember 2020. Afidavit defendan-defendan tidak menyatakan butir-butir mengenai ketidaktepatan yang dikatakan dalam pengiraan jumlah yang dituntut (lihat perenggan 26–27).

(3) Defendan-defendan gagal memberikan sebarang butiran atau menunjukkan sebarang dokumen untuk menyokong hujahan mereka bahawa perjanjian kemudahan antara pihak-pihak adalah terbatal dan tidak sah kerana tidak mematuhi Syariah. Hujahan tersebut tidak mencukupi untuk membantah permohonan penghakiman terus.

A Defendan-defendan telah gagal untuk membangkitkan isu-isu untuk dibicarakan untuk membolehkan perkara tersebut melalui perbicaraan penuh (lihat perenggan 28, 30, 32 & 58).]

Cases referred to

B *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14, SC (refd)
Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)
C *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569, FC (refd)
National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 2 CLJ 220, FC (refd)
D *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (folld)
Ramah bt Ta'at v Laton bt Malim Sutan [1931] 6 FMSLR 128 (refd)
UNP Plywood Sdn Bhd v HSBC Bank Malaysia Bhd [2010] 5 MLJ 323; [2010] 5 CLJ 177, CA (refd)
E *Wealthy Growth Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2019] 1 LNS 2033, HC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 (repealed by Financial Services Act 2013) s 124, 124(7)
F Central Bank of Malaysia Act 2009 ss 56, 57
Companies Act 1965 (repealed by Companies Act 2016)
Courts of Judicature Act 1964 s 84
Federal Constitution arts 3(1), 8, 74, 128(2), Ninth Schedule, Lists I, II, Item 1
G Islamic Banking Act 1983 (repealed by Islamic Financial Services Act 2013) s 2
Islamic Financial Services Act 2013 s 28(2)
Rules of High Court 1980 O 83, O 83 r 3
H Rules of Court 2012 O 14, O 14 r 1, O 81

Nadia bt Md Tab (Fatimah Zahrah & Co) for the plaintiff.
Nur'Ain bt Mohd Najib (Sahrihan & Hamdan) for the defendant.

Awang Armadajaya JC:

I

INTRODUCTION

[1] This is an application vide encl 15 for a summary judgment pursuant to O 14 of the Rules of Court 2012 and the application is for the following orders:

(a) a summary judgment be entered against the defendants for the sum of RM1,002,638.20 as it stands on 31 December 2020;

(b) late payment damages at the rate of 1%pa from 1 January 2021 until full and final settlement;

(c) cost of this application; and

(d) other reliefs that the court deems fit and just.

[2] The cause papers are as follows:

(a) notice of application (encl 15);

(b) affidavit in support (encl 16);

(c) affidavit in opposition (encl 17); and

(d) reply to affidavit in opposition (encl 19).

BACKGROUND FACTS

[3] The plaintiff is a company registered in Malaysia with the registered address at Level 14 Bangunan CGC Kelana Business Centre, 97 Jalan SS7/2, 47301 Petaling Jaya, Selangor.

[4] The first defendant is a company incorporated in Malaysia and registered under the Companies Act 1965 and at all material times the client of the plaintiff and has an address for service at No 46 Jalan Timah Sari, 83000 Batu Pahat, Johore and/or No 12 Kampung Parit Lapis Simpang Tiga, 83500 Batu Pahat, Johore and/or No 4 Tingkat 1, Jalan Siakap, Jalan Muar, Parit Suling, 83500 Batu Pahat, Johore.

[5] The second and third defendants are individuals who are of full age, Malaysian citizens and they are guarantors of the first defendant. The second defendant has his address for service at Kampung Parit Lipis, Simpang Tiga, 83500 Parit Sulong, Johore.

[6] The third defendant has an address of service at D123, Kampung Parit Mustaffa, 83500 Parit Sulong, Johore.

[7] Vide a letter of offer dated 26 July 2017 and a supplementary letter of offer dated 5 September 2017, ('the offer letters') and upon the application of the first defendant, the plaintiff agreed to provide to the first defendant the commodity financing facility known as Murabahah Term Financing Facility No 1000579177 under the Bumiputera Islamic Murabahah Commodity Project Fund to the amount of RM3m to finance the following project:

PROPOSAL TO DEMOLISH 2 BLOCKS OF BUILDINGS AND REBUILDING A NEW 2 STOREY AT THE ROAD TRANSPORT DEPARTMENT BUILDING, MUAR BRACH, JOHORE.

('the said assets') subject to terms and conditions as stipulated in the offer letters as well as annexures. The first defendant accepted the offers and signed the offer letters on 27 July 2017 and 6 September 2017.

[8] The defendants executed the Commodity Murabahah Financing-I Facility Agreement dated 4 August 2017 and the deed of assignment contracts proceeds dated 4 August 2017.

[9] The second and third defendants are guarantors to the first defendants have agreed to jointly and/or severally guaranteed to the plaintiff to pay all the sum of monies owed and payable under the facility by executing a guarantee agreement dated 4 August 2017.

[10] The plaintiff then issued a notice of demand dated 8 February 2021 to demand for the payment for the sum of RM1,002,683.20 as of 31 December 2020.

[11] Until to-date, the defendants have failed/refused/neglected to pay the sum of RM1,002,683.20 as of 31 December 2020, and hence this application.

THE LAW IN RESPECT OF SUMMARY JUDGMENT PURSUANT TO O 14 OF THE RULES OF COURT 2012

[12] The law on summary judgment pursuant to O 14 r 1 of the Rules of Court 2012.

[13] The law is set out in O 14 r 1 of the Rules of Court 2012.

14 Summary judgment

Application by plaintiff for summary judgment (O 14 r 1)

(1) *Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the court for judgment against that defendant*.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than:

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff based on an allegation of fraud. A

(3) This Order does not apply to an action to which Order 81 applies.

[14] The requirements of O 14 r 1 are:

(a) statement of claim served on defendant; B

(b) defendant has entered appearance;

(c) defendant has (either);

(i) no defence to the claim included in the writ; or C

(ii) no defendant to a particular part of the writ; or

(iii) has no defence to claim except for quantum of damages;

(d) the claim is NOT a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, or a claim by the plaintiff based on an allegation of fraud. D

[15] This order does not apply to an action to which O 81 of the Rules of Court 2012 applies. E

[16] This was explained in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220:

The defendants in opposing the application under O 14 r 1 must now raise a triable issue so as to open the path to a full trial. F

[17] This has been succinctly put into words in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14. G

[18] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14, it was held that:

Under an O 14 r 1 application, the duty of a judge does not end as soon as a fact asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. H

[19] In *UNP Plywood Sdn Bhd v HSBC Bank Malaysia Bhd* [2010] 5 MLJ 323; [2010] 5 CLJ 177 the Court of Appeal held that: I

Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff or a counterclaim by a defendant,

without a trial when there is no dispute as to the fact and law.

The burden is always on the plaintiff to show that it has a clear and undeniable claim against the defendant and summary judgment can be allowed on the basis that the facts established in the pleading clearly show there is no triable issues to warrant a full trial (see *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544).

[20] In that case, although the Court of Appeal was discussing O 83 of the Rules of High Court 1980, the issue of unilateral change in interest rates must be address and whether the respondent has agreed to the change.

Similarly, in the present appeal it has been shown to us that the interest claimed is based on the second charge. We agreed with the learned counsel for the appellant that when the second offer was made and accepted it was stated clearly that that offer would extinguish the first offer upon which the first charge was based and the first offer was of no consequence anymore. The second charge made it very clear that the rate of interest is 2% above BLR. As I had stated earlier, the rate of the BLR is not stated anywhere in the charge. As such, the appellant was left in the dark as to the actual rate of interest applicable. This was further confounded by the fact that in the amount claimed also included interest rate which had been varied. Secondly, the learned counsel for the appellant also contended that the respondent arbitrarily varied the interest rate from 15.5%pa to 16.5%pa when the respondent made the application for the order for sale. Nowhere in the affidavits of the respondent that the respondent had given notice in writing of the variation as required by the charge instrument. As such it is clear to us that the respondent had not complied with O 83 r 3 Rules of High Court 1980.

THE ISSUES IN THIS APPLICATION VIDE ENCL 15

[21] There are two issues before this court

(a) whether there is any meritorious defence against the claims of the plaintiff; and

(b) whether the agreement is null and void because of the allegation of Syariah non-compliance.

[22] I shall deal with the issues accordingly.

Whether there is any meritorious defence against the claims of the plaintiff

[23] It was submitted by the learned counsel for the defendants that the sum of RM1,002,683.20 as of 31 December 2020 is being disputed as the plaintiff failed to produce documents on payment by the Public Works Department to the plaintiff.

[24] I have perused over the cause papers and I found in encl 19 exh 'FSK' there is the statement of account for the escrow account that states payment by the Public Works Department. I found that that document has not been contradicted by the defendants.

[25] Hence the principles in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609 is applicable, that is to say, 'It is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted'.

[26] I am satisified that:

(a) the plaintiff agreed to provide to the first defendant the commodity financing facility known as Murabahah Term Financing Facility No 1000579177 under the Bumiputera Islamic Murabahah Commodity Project Fund to the amount of RM3m to finance the following project:

PROPOSAL TO DEMOLISH 2 BLOCKS OF BUILDINGS AND REBUILDING A NEW 2 STOREY AT THE ROAD TRANSPORT DEPARTMENT BUILDING, MUAR BRANCH, JOHORE.

(b) the first defendant accepted the offers and signed the acceptance to the offer letters on 27 July 2017 and 6 September 2017;

(c) the defendants executed the Commodity Murabahah Financing-I Facility Agreement dated 4 August 2017 and the deed of assignment contracts proceeds dated 4 August 2017;

(d) the second and third defendants are guarantors to the first defendant have agreed to jointly and/or severally guaranteed to the plaintiff to pay all the sum of monies owed and payable under the facility by executing a guarantee agreement dated 4 August 2017;

(e) the sum disbursed (including the profits calculated) is the sum of RM1,002,683.20 as of 31 December 2020; and

(f) the plaintiff then issued a notice of demand dated 8 February 2021 to demand for the payment for the sum of RM1,002,683.20 as of 31 December 2020.

[27] The affidavit in opposition of the defendants did not give particulars of the alleged inaccuracies of the calculations. It is unfortunate when parties opposing an application for summary judgment do not offer sufficient details or documents.

[28] The defendants in opposing the application under O 14 r 1 must now raise a triable issue so as to open the path to a full trial.

[29] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14, it was explained that the defendants in opposing the application under O 14 r 1 must now raise a triable issue so as to open the path to a full trial.

[30] This is what the defendants failed to raise.

Whether the agreement is null and void because of syariah non-compliance

[31] It was submitted by the learned counsel for the defendants that the facility provided is Syariah non-compliant.

[32] Again, no details given and no documents exhibited in support.

[33] This court is not a *Fatwa* Committee which is the authority to decide on whether a matter is in compliance with Syariah or otherwise.

[34] In *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569, FC ('JRI Resources'). The applicant was at all material times, a customer of the respondent, a financial institution. Sometime in 2008, the applicant was granted various Islamic credit facilities, ie, four Ijarah Muntahiah Bitamlik facilities ('Ijarah facilities') and a Murabahah Tawarruq Contract Financing facility ('MTQ facility'), the repayment of which was guaranteed by the second, third and fourth defendants in the court below. The Ijarah facilities concerned the leasing of shipping vessels by the respondent to the applicant. Premised on the applicant's failure to make payment of the amount outstanding under the facilities, the respondent filed a civil action and obtained summary judgment against the applicant and the guarantors. The applicant appealed to the Court of Appeal. At the Court of Appeal, the applicant submitted that his failure to derive income from the charter proceeds was due to the failure of the respondent to carry out major maintenance works on the vessels, which the applicant alleged, was the responsibility of the respondent as the owner of the vessels. The applicant also submitted that the High Court had erred in not seeking a ruling on a Syariah issue in relation to the Syariah compliance of cl 2.8 of the Ijarah facilites agreements. The Court of Appeal allowed the appeal and remitted the case to the High Court for trial and directed that the question as to whether cl 2.8 of the Ijarah agreements (which makes it the obligation of the customer to bear all the costs of maintaining the leased vessels, including major maintenance), is Syariah-compliant, be referred to the Syariah Advisory Council ('SAC'). The

SAC delivered a ruling to the effect that negotiations to determine which party should bear the cost of an asset was allowed, as long as it had been agreed by the contracting parties. The effect of the ruling was that cl 2.8 of the Ijarah facilities was Syariah-compliant. The applicant declined to accept the ruling issued by the SAC and filed an application for a reference to the Federal Court pursuant to art 128(2) of the Federal Constitution ('the FC') and s 84 of the Courts of Judicature Act 1964 to determine if ss 56 and 57 of the Central Bank of Malaysia Act 2009 ('the CBMA'), under which the SAC gave its ruling, was constitutionally valid. The High Court dismissed the applicant's application for constitutional reference and therefore, the applicant appealed. The Court of Appeal allowed the appeal and ordered the High Court to make the constitutional reference sought by the applicant. Hence, the reference herein. The constitutional questions raised for determination by the apex court herein were: (a) whether ss 56 and 57 of the Central Bank of Malaysia Act 2009 are in breach of the FC and unconstitutional by reason of: (i) contravening art 74 of the FC read together with the Ninth Schedule of the FC for the SAC having been vested with the power to ascertain Islamic law; (ii) contravening Part IX of the FC for the said sections having the effect of vesting judicial power in the SAC; or (iii) contravening art 8 of the FC for the said sections having the effect of denying a litigant substantive due process; (b) if the above was answered in the negative: (i) whether the court was nonetheless entitled to accept or consider the expert evidence in respect of any questions concerning a Syariah matter relating to Islamic finance business. In that case, the binding authority of the opinion of the Syariah Advisory Council was not deemed to violate judicial power as the secular superior courts were in the first place deemed not to have any power to decide on substantive Syariah or Syariah-related issues.

[35] It was held (for the majority):

> [54] To provide context, we first give an overview of the unique characteristics of Islamic banking. *One of the unique characteristics of Islamic banking and finance is compliance with Syariah principles and rulings. Syariah compliance is what distinguishes an Islamic bank from a conventional bank as the former observes certain rules and prohibitions not observed by the latter. Failing to fulfil Syariah compliance requirements would generate a risk called 'the Syariah non-compliance risk'*. This risk is unique to the Islamic banking and finance industry, and is particularly significant to it for the following reasons:
>
> (a) *it generally impacts the industry's reputation as well as the reputation of the financial institutions and thus, it may deteriorate reliance by depositors, investors, customers and stakeholders in the long term*;
>
> (b) *contracts containing Syariah repugnant elements which had already been executed are liable to be deemed null and void, which would in turn render the profits derived thereof non-halal. As a result the tainted income arising from such transactions must be channelled to charity and cannot be kept by the bank*; and

A (c) *it may involve some legal costs as potential suits may lead to payment of damages*.

[55] Therefore, the existence of a non Syariah-compliant element would not only affect the confidence of the public in the Islamic banking and finance industry, but it might also expose an Islamic bank to losses and fiduciary and reputational risks.

B [56] *Hence, Syariah compliance is the backbone of the Islamic banking and finance industry and Syariah principles are the raison détre of all Islamic financial contracts. It gives legitimacy to the practices of the Islamic banking and finance industry and thus validate the profits. It also boosts the confidence of all stakeholders that all the practices and activities of the bank are in compliance with the Syariah. Besides, s 28(2) of the* C *Islamic Financial Services Act 2013 states that one of the duties of an Islamic financial institution is 'to ensure that its aim and operation, business, affairs and activities are in compliance with Syariah'.*

[57] *However, compliance with Syariah will be confidently achieved only by having a* D *proper Syariah governance framework. This is because Syariah governance is meant to ensure compliance by the Islamic banking and finance industry with the rules of Syariah*.

[58] *In Malaysia, the Syariah governance framework is based on the centralised model compared to a decentralised one being practiced in Gulf Cooperation Council ('GCC') countries. The centralised model is formed on the basis that the BNM itself has its own* E *Syariah supervisory board called the Syariah Advisory Council ('SAC')*.

(see Rusni Hassan, Uzaimah Ibrahim, Nurdiana Irwani Abdullah, Akhtarzaite Abd Aziz and Mohd Fuad Sawari, '*An Analysis of the Role and Competency of the Syariah Committees (SCs) of Islamic Banks and Financial Service Providers*', Research Paper (No 18/2010)).

F [59] The SAC was established pursuant to s 124 of the Banking and Financial Institutions Act 1989 (now repealed) ('the BAFIA') which was amended vide the Banking and Financial Institutions (Amendment) Act 1996. The amending act had amended s 124(7) of the Banking and Financial Institutions Act 1989 (now repealed) to state as follows:

G *(7) For the purposes of this section*:

(a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank on the Syariah relating to Islamic banking business or Islamic financial business;

H

[60] The Central Bank of Malaysia Act 1958 ('the 1958 Act') was then amended by the addition of s 16B which came into force on 1 January 2004.

[61] The old s 16B of the 1958 Act expressly stated that where in any proceedings relating to Islamic banking business and Islamic financial business which is based on I Syariah principles before any court or arbitrator any question arises concerning a Syariah matter, the court or the arbitrator may refer such question to the SAC for its ruling. Any ruling made by the SAC pursuant to a reference by a court, shall be taken into consideration by the court and if the reference was made by an arbitrator, shall be binding on the arbitrator.

[62] Pursuant to the aforesaid provisions, it was not mandatory for the court to refer to the SAC any Islamic and/or Syariah principles. Although the court has to consider the ruling(s), but the court is not bound by such rulings(s). It binds two arbitrators though. However, following the growth of Islamic finance in Malaysia, there was a corresponding rise in disputes in relation to Islamic products in the civil courts.

[63] In the absence of any binding and definitive rulings of the SAC, the learned authors Adnan Trakic and Hanifah Haydar Ali Tajuddin, commented:

> *There are instances where different courts have decided differently on the same Islamic banking matters. The asymmetric approaches by the Malaysian judges in deciding Islamic banking and finance issues have widened the uncertainty, and that could adversely affect the future development of Islamic banking and finance industry*.

(see Adnan Trakic and Hanifah Haydar Ali Tajudin (eds), '*Islamic Banking & Finance: Principles, Instruments & Operations*' (p 52) (the Malaysian Current Law Journal 2016))

[36] Further down in the learned judgment, it was held that:

[77] *The 2009 Act has enhanced the role and functions of the SAC. The SAC is now the sole authority for the ascertainment of Islamic law for the purpose of Islamic financial business. Although every Islamic financial institution is responsible to form their own Syariah Committee at their institutional level, they are required to observe the advice from the SAC pertaining to Islamic financial businesses. Similarly, when a ruling given by the Syariah Committee members constituted in Malaysia by an Islamic financial institution differs from the ruling given by the SAC, the ruling of the SAC shall prevail. This further clears the ambiguity and creates no opportunity for such conflicting ruling/advice to be rendered at all by Syariah Committees*.

[78] *The 2009 Act further affirms the legal status of Syariah pronouncements issued by the SAC as binding upon both the courts as well as arbitrators. The court or an arbitrator is required to refer to the SAC for deliberation on any Syariah issue as well as take into account its existing Syariah rulings. Undeniably, legal certainty is upheld by the 2009 Act through legal recognition of the SAC as the reference point for courts and arbitrators on any Syariah matter in relation to Islamic finance* business. This is crucial to promote consistent implementation of Syariah contractual principles in Islamic financial transactions.

(see Tun Abdul Hamid Mohamed and Dr Adnan Trakic, '*The Syariah Advisory Council's Role in Resolving Islamic Banking Disputes in Malaysia: A Mode to Follow?*' (International Syariah Research Academy for Islamic Finance (ISRA) Research Paper (No 47, 2012)).

[37] In *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839 at pp 851 and 853–855; [2009] 6 CLJ 22 (CA). In doing so, the Court of Appeal held that the BBA facility agreement was valid and enforceable. The Court of Appeal further held that Islamic financing facilities do not have to satisfy all four *mazhabs* to be considered acceptable in

the religion of Islam. On this, the Court of Appeal held at p 37 (CLJ); p 853 (MLJ):

> *With utmost respect, the learned judge had misinterpreted the meaning of 'do not involve any element which is not approved by the religion of Islam'. First, under s 2 of the Islamic Banking Act 1983, 'Islamic banking business' does not mean banking business whose aims and operations are approved by all the four mazhabs. Secondly, we do not think the religion of Islam is confined to the four mazhabs alone as the sources of Islamic law are not limited to the opinions of the four imams and the schools of jurisprudence named after them. As we all know, Islamic law is derived from the primary sources ie the Holy Quran and the Hadith and secondary sources. There are other secondary sources of Islamic law in addition to the jurisprudence of the four mazhabs.*

[38] The Court of Appeal stressed the fact that civil court judges should not decide whether a matter is in accordance with the religion of Islam or not. The Court of Appeal held:

> [32] *In this respect, it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the religion of Islam or otherwise. As rightly pointed out by Suriyadi J (as he then was) in Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210; [2008] 1 LNS 347 *that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulama take years to comprehend'. Thus, whether the bank business is in accordance with the religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.* (Emphasis added.)

[39] I wish to stress here that in order for a determination for Syariah compliance or otherwise, the burden lies on the party that asserts. Islamic banking (or Syariah compliant banking) is part and parcel of the Malaysian banking system (which has both conventional or interest based and the non-interest based or Syariah compliant banking).

[40] When we say about Syariah compliant banking, we are talking about a banking system which is in conformity with the Syariah or that it does not violate any principles of the Syariah.

[41] The *Oxford Dictionary* (Oxford University Press 2020) defines 'Syariah' as 'Islamic canonical law based on the teachings of the *Koran* and the traditions of the Prophet (*Hadith* and *Sunna*), prescribing both religious and secular duties and sometimes retributive penalties for lawbreaking. It has generally been supplemented by legislation adapted to the conditions of the day, though the manner in which it should be applied in modern states is a subject of dispute between Muslim traditionalists and reformists'.

[42] The primary sources of Syariah are the *Qur'an* and the *Sunna* (the

traditions of the Holy Messenger Muhammad pbuh). The intepretations of these primary sources have been formalised into a discipline called *Usool al fiqh* which is the Islamic Jurisprudence containing among other things, canons of intepretations, *Uloom al Quran* (Sciences of the Quran), *Uloom al Hadeeth* (Sciences of the *Hadeeth* or the transmitted *Sunna*).

[43] There is another branch of no less importance which is *Qawaid al Fiqhiyyah* (Islamic Legal Maxims) which are, in many ways, similar but not the same with the maxims of equity. In the famous *al Majalla al Ahkam al Adaliyyah* from the Ottoman days (often spelt as '*Mejelle*') there are some 5,000 maxims for business and other muamalat transactions.

[44] In *Wealthy Growth Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2019] 1 LNS 2033 it was held that:

> I take note that common law is part of Malaysian law as defined in art 160(2) of the Federal Constitution, which reads:
>
> *'Law' includes written law, the common law is so far as it is in operation in the Federation or any part thereof.*
>
> This was explained succinctly in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41 (through His Lordship Federal Court Justice Jeffery Tan's learned judgment).

[45] Further down in the same judgment, the court said:

> *'Written Law' is defined in art 160 as follows: 'Written law' includes this Constitution and the Constitution of any State*;
>
> *Since 'Written Law' is inclusive of the Federal Constitute, it must be of a higher rank than common law since the Federal Constitution is the supreme law of the Federation (see art 4(1)).*
>
> *Apart from the fact that in Malaysia, the powers to make law in general, rest with the legislature (with few exceptions such as when there is a Promulgation of the State of Emergency).*
>
> *'Malaysian Written Law' which are the Federal Constitution, Acts of Parliament, State Enactments/Ordinances takes precedence over common law.*
>
> *However it is important to note that common law (Equity included) are crucial in Malaysian understanding Law of*:
>
> (a) *The Malaysian Law that rested on common law concepts;*
>
> (b) *The intentions of the Malaysian Law is somewhat in tandem with the common law; and*
>
> (c) *The Malaysian Law is reflective of universal value, (sometimes known as 'grundnorms') and is also reflected in common law.*

[46] Since 'Law' includes the Federal Constitution and in the Ninth

Schedule, the Federal List enumerate 'Banking' as one of its own, then all banking including Syariah based banking are federal laws.

[47] Other areas of law which are Syariah based includes the *takaful* (Islamic insurance), Islamic capital market etc.

[48] Islamic Law as defined under the State List of the Ninth Schedule Federal Constitution as 'including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; *Wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; *Zakat*, *Fitrah* and *Baitulmal* or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom'.

[49] A cursory reading of this would show that these are primarily personal and family laws governing those professing the religion of Islam.

[50] Islamic banking or Islamic capital market or Islamic insurance do not fall within this definition. Hence they fall within their respective items in the Federal List of the Ninth Schedule Federal Constitution.

[51] I bear in mind an old case of *Ramah bt Ta'at v Laton bt Malim Sutan* [1931] 6 FMSLR 128, the appellant in this case was a widow of the deceased and administratix of the estate. The deceased did not make a will on behalf of his property. The respondent was another widow (second wife) of Mat Dawi who sued the appellant for a declaration that all movable and immovable property was *harta syarikat* (matrimonial property) and she is also entitled to a half in the property. During the trial, the court held that the respondent entitled to a one half share on the *harta syarikat* according to Mohammedan Law. The appellant had appeal on this judgment. It was held by His Lordship Justice Thorne that Islamic law is not a foreign law but a local law and addressed his opinion to the then colonial government in these words:

It is perhaps not out of place for me to remark that the time has now arrived when the

attention of the executive might well be drawn to the existing state of the law as affecting Mohamedans in the Federated Malay States. Mohamedan law is varied in the different States in the Federation, and in some instances in different districts of the same State, by local customs having the force of law, and it would not be practicable therefore to pass a Federal Enactment dealing with all the States of the Federation. It seems to me, however, that State Enactments might well be passed dealing with the questions of the rights of parties upon divorce, and upon succession to the estate of deceased interstates, which more commonly arise, and giving power to the courts to take evidence in more involved cases not covered by the provisions of the enactment as to the law of the matter in debate. Although I have held that the Supreme Court has jurisdiction to deal with such cases as the present, the further question emerges as to whether or not the Supreme Court is the proper tribunal for dealing with these cases, and whether it would not be more consonant with the views of those professing the Mohamedan religion that His Highness the Sultan in Council in each State should establish special courts for dealing with these cases with an appeal to His Highness the Sultan in Council in each case; of course the jurisdiction of the Supreme Court and of the Court of Appeal would properly be excluded by such enactment.

[52] We must keep in mind that all judgments by judges since the three Charters of Justice are part and parcel of our legal system unless overruled and even then to that extent only, to the best of my knowledge, *Ramah bt Ta'at v Laton bt Malim Sutan* [1931] 6 FMSLR 128 has never been overruled. Hence it is still good law.

[53] Syariah based banking must be in compliance with Syariah principles. It has been dealt with by statutory laws such as the Islamic Banking Act 1983. The Islamic Banking Act 1983 was first brought into force in 1983 and subsequently, it was repealed and replaced by the Islamic Financial Services Act 2013 ('the IFSA') which came into force on 30 June 2013.

[54] The Islamic Financial Services Act 2013 and all other laws that is based on the Syariah will have an overriding clause which reads as follows:

Section 6:

Regulatory objectives

The principal regulatory objectives of this Act are to promote financial stability and compliance with Syariah and in pursuing these objectives, the Bank shall:

(a) foster:

(i) the safety and soundness of Islamic financial institutions;

(ii) the integrity and orderly functioning of the Islamic money market and Islamic foreign exchange market;

(iii) safe, efficient and reliable payment systems and Islamic payment instruments; and

(iv) fair, responsible and professional business conduct of Islamic financial institutions; and

(b) strive to protect the rights and interests of consumers of Islamic financial services and products.

[55] Apart from that, s 28(2) of the Islamic Financial Services Act 2013 states that one of the duties of an Islamic financial institution is 'to ensure that its aim and operation, business, affairs and activities are in compliance with Syariah'.

[56] Since these statutes are part and parcel of the Malaysian legal system, it is not wrong to say that Islamic law is not a foreign law but it is part and parcel of the law of the land that is recognised and sanctioned by the supreme law of the land, the Federal Constitution.

[57] This is not merely by the operation of art 3(1) of the Federal Constitution or Item 1, State List, Ninth Schedule Federal Constitution but above and beyond that, the historical context of the Malaysian legal system starting effective during the Malacca Sultanate dates. The Brunei Sultanate in her heydays, had a hold in parts of Johore and the entire States of Sabah and Sarawak, not to mention parts of other countries such as Sulu, Zamboanga, Kalimatan, Celebes, Sulwesi, Southern Vietnam etc.

[58] I have perused over the cause papers and unfortunately for the defendants, I found there was nothing adduced or exhibited to show that the banking facility provided by the plaintiff to the defendants is not in compliance with the Syariah. Such bald assertions, I regret to say, in gravely insufficient to oppose an application such as this.

CONCLUSION

[59] I have perused over the cause papers, the written submissions as well as heard parties. I am unable to acceded to the arguments of the defendants.

[60] For the reasons I have stated above, I allow encl 15 with cost.

Application for summary judgment allowed.

Reported by Ashok Kumar